

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
Appeal No.849 of 1998
In
Arbitration Petition No.203 of 1993
In
Award No.170 of 1993

Union of India,)
(through Department of Fertilizers))
Ministry of Chemicals and)
Fertilizers, Shastri Bhavan,)
New Delhi 110 001.).. Appellant
(Org.Petitioner)

Versus

M/s.Deepak Fertilizers &)
Petro-chemicals Corporation)
Limited, 10/B, Bhaktawar,)
Nariman Point, Bombay 400 021.).. Respondent
(Org.Respondent)

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Ms S.I.Shah with Shri Anurag Gokhale i/b T.C.Kaushik
for the Appellant.

None present for the Respondent.

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CORAM : R.M.S.KHANDEPARKAR &
DR.D.Y.CHANDRACHUD, JJ

DATED : 2ND FEBRUARY, 2007

ORAL JUDGMENT: (Per R.M.S.KHANDEPARKAR, J)

1. Heard. This appeal arises from the judgment
and order dated 15th January, 1997 passed by the
learned Single Judge in Arbitration Petition No.203 of

1993 whereby the learned Single Judge has dismissed the said petition which was filed by the appellant. By the said award, the learned Arbitrator has directed the respondent to pay a sum of Rs.8,50,000/- with simple interest at the rate of 12% per annum with effect from 14th June, 1988 till the date of payment of the entire amount, while disposing the matter relating to the claim of the appellant to the tune of Rs.90,10,395/- besides interest at the rate of 17% per annum thereon from 5th August, 1982 onwards.

2. The learned advocate appearing for the appellant placing reliance in the decision of the Apex Court in the matter of **Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd.**, reported in (2003)5 SCC 705 submitted that the learned Single Judge erred in dismissing the petition without considering the fact that in terms of the agreement between the parties, the respondent had agreed to pay damages which could be calculated at the rate of 6% per annum to the maximum limit of the value of equipments mentioned in the annexures to the agreement and considering the same, the appellant had calculated the claim for damages accordingly at the rate of 6% to the maximum limit of the value of the said equipments and there was no justification disclosed by the respondent to

deny such claim of the appellant. The learned Single Judge ought to have considered that the learned Arbitrator had erred in restricting the claim for damages to the extent of Rs.8,50,000/- as also interest at the rate of 12%, the same being totally contrary to the terms of the agreement duly agreed between the parties. The law on the point is well settled by the decision of the Apex Court in **Oil & Natural Gas Corporation Ltd.'s case (supra)**. In that regard, the learned Single Judge ought to have considered that the learned Arbitrator had no option but to grant damages in accordance with the claim of the appellant, as the same were established in terms of the agreement between the parties and there is no dispute about the factual aspect of the claim of the appellant regarding damages.

3. None has appeared on behalf of the respondent, though served. Upon hearing the learned advocate for the appellant and on perusal of the record, the only point which arises for consideration is whether the relief restricted by the learned Arbitrator to the extent of Rs.8,50,000/- is in contravention of the terms of the agreement between the parties and that the Learned Single Judge failed to consider the same ?

4. The records undisputedly disclose that the agreement had been entered between the Union of India- the appellant herein and the respondent on 19th February, 1982. The clauses (1) and (2) of the said agreement read thus:-

- (1) The Government has agreed to issue the import licence for the items of equipments annexed hereto on the representation made by DFPCL and on the clear understanding that the DFPCL will install the equipment and achieve "Commercial Production" of the plant within 30 months from the "Effective Date". If the "Commercial Production" of the said plant is delayed beyond 30 months from the "Effective Date", the DFPCL agree to pay to the Government for the delay of each calendar month or part thereof beyond 30 months from the "Effective Date" subject to the exception in the case of delay caused due to the happening of any war, hostility, acts of public

enemy, civil commotion, sabotage, fires, floods explosion, epidemics, quarantine restrictions, strikes, lock-outs or acts of God or State provided notice of happening of any such eventuality is given by DFPCL to the Government within 7 days from the date of occurrence hereof, damages equal to 1% of the value of the equipments mentioned in the annexure which is Rs.14,05,26,100/- (Rupees Fourteen Crores Five Lakhs Twenty Six Thousand One Hundred Only) provided, however the total damages to the Government under this agreement shall not exceed 6% of the sum of Rs.14,05,26,100/- (Rupees Fourteen Crores Five Lakhs Twenty Six Thousand One Hundred Only). The first 15 days of delay after the said 30 months from the "Effective Date" shall not be counted for the purpose of levying the said penalty by Government on the DFPCL.

- (2) The above damages shall become payable by the DFPCL on the expiry of the said 30 months for "commercial production" of the Plaintiff from the "Effective Date" and shall be paid within 30 days from the demand made by the Government to the DFPCL. In addition to the said damages simple interest at the rate of 17% per annum on the amount of damages for the delay in making payment of the damages due shall also be paid by the DFPCL from the date the liability to pay the said damages arises upto the date of actual payment."

5. As there was delay of about 11 months in commencing the commercial production the appellant herein served a notice dated 30th October, 1987 upon the respondent demanding damages amounting to Rs.42,15,783/- besides interest. The claim was obviously made at the rate of 3% of the total sum i.e. Rs.14,05,26,100/-. Consequent to issuance of the said notice and after taking into consideration the representation made by the respondent on the said

demand, a fresh notice dated 9th October, 1991 was issued claiming damages at the rate of 6% under clause (1) of the said agreement, thereby demanding total sum of Rs.90,10,395/- besides interest at the rate of 17% with effect from 5th August, 1982. Since the said amount was not paid and dispute was sought to be raised, consequent to the request by the respondent for appointment of Arbitrator in terms of clause (8) of the said agreement, on 19th May, 1982 a Sole Arbitrator came to be appointed in the matter and the said Arbitrator entered upon the Reference on 17th August, 1982 and after hearing the parties declared the Award on 30th November, 1992. The learned Arbitrator awarded Rs.8,50,000/- and the interest at the rate of 12% per annum on the said sum. It was held by the learned Arbitrator that though the contract provided for 6% of the total sum as maximum amount of damages, it also provided for minimum of 1% of the total sum and considering the fact that the records do not disclose intentional negligence on the part of the respondent in causing delay in completion of supply of equipments, minimum percentage of damages would be appropriate, and therefore, the learned Arbitrator awarded total amount of Rs.8,50,000/-.

6. Undoubtedly, as per the agreement between the

parties, the respondent was required to install the equipments and achieve commercial production of the plant within 30 months from the effective date and in case of any delay beyond 30 months in that regard, the respondent had to pay for each calendar month or part thereof beyond 30 months from the effective date the damages equal to 1% of the value of the equipments i.e. total sum of Rs.14,05,26,100/- provided that total damages were not to exceed 6% of the said amount. The case put forth and established by the appellant in terms of the letter dated 9th October, 1991 before the learned Arbitrator, as revealed from the Award passed by the learned Arbitrator, discloses that there was a delay of about 11 months for commencement of commercial production clearly on account of non supply of equipments during the said period by the respondent. Taking into consideration the same and the original total value of the equipments being Rs.14,05,26,100/-, damages at the rate of 6% of that value were calculated at Rs.84,31,566/-, and in accordance with the supplemental equipments being for Rs.96,47,153/-, the damages at the rate of 6% on Rs.96,47,153/- were calculated at Rs.5,78,829/-, thereby total value was considered as Rs.15,01,73,253/- and damages of Rs.90,10,395/- at the rate of 6% of the said total

value were claimed.

7. Once it is not in dispute that the agreement clearly entitles the appellant for damages for delay beyond 30 months from the effective date and damages are to be calculated at the rate of 1% of the total value of the equipments of Rs.14,05,26,100/-, however the maximum total damages could be claimed at the rate of 6% of the said total sum of Rs.14,05,26,100/-, and it was clearly established before the learned Arbitrator that 6% of the sum of Rs.14,05,26,100/- in the form of damages were Rs.84,31,566/-, obviously, the appellant had established its claim for the said amount taking into consideration clause (1) of the agreement between the parties.

8. The award passed by the learned Arbitrator, as rightly pointed out by the learned advocate for the appellant, discloses that the learned Arbitrator has restricted the award to the tune of Rs.8,50,000/- merely by observing that considering the various factors minimum penalty would suffice as no intentional negligence on the part of the respondent in causing delay is disclosed. Indeed, the award nowhere discloses any reference to any of the so called "various factors" which have been taken into

consideration by the learned Arbitrator to arrive at a finding about sufficiency of amount of Rs.8,50,000/- as the damages. Plain reading of the said award and the agreement between the parties would reveal that the quantum of Rs.8,50,000/- is not justifiable nor it could have been arrived at after taking into consideration the terms of the agreement and particularly the total value of the equipments which was agreed to be the basis for calculating damages in case of delay in supply of equipments. Once the parties in no uncertain terms had agreed for the basis for the purpose of calculating damages in case of delay, there was no occasion for the learned Arbitrator to grant damages otherwise than on the basis of the terms of the agreement between the parties. The learned Arbitrator having totally ignored the same, certainly erred in arriving at the finding that it would be just and proper to impose penalty to the extent of Rs.8,50,000/- on assumption that there was no intentional negligence on the part of the respondent in causing delay. The Apex Court in **Oil & Natural Gas Corporation Ltd.'s case (supra)** has clearly held that the terms of the contract shall be the basis for calculating the damages in case of breach of conditions of the agreement. It was clearly ruled that "terms of the contract are required to be

taken into consideration before arriving at the conclusion whether the party claiming damages is entitled to the same," and further that "if the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless it is held that such estimate of damage/compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay such compensation and that is what is provided in Section 73 of the Contract Act". Once the term of the agreement clearly provided for damages to the aggrieved party in case of breach of the agreement between the parties and the methodology for calculating damages, the learned Arbitrator could not have travelled beyond the terms of the agreement to assume that the claim being in the form of penalty for delay in completion of project, and that therefore, it would be sufficient to restrict to 1% of the total value of the equipment and on that count to restrict the damages to the tune of Rs.8,50,000/-. Obviously, the said finding is neither borne out from the record nor in accordance with the terms of the agreement between the parties, and therefore, the same is clearly unsustainable and in that regard, we are fortified in our view by the decision of the Apex Court in **Oil & Natural Gas Corporation Ltd.'s case**

(supra).

9. Since the terms of the agreement between the parties clearly specify that for delay, the damages could be 6% of the value and as there was delay of about 11 months, certainly the appellant is entitled to claim damages to the tune of Rs.84,31,566/- which is the maximum amount of damages claimed, i.e. 6% of the total value of Rs.14,05,26,100/-. The appellant is also justified in claiming interest at the rate of 17% in terms of Clause (2) of the agreement. Since the parties have specifically agreed for the said interest rate and as the impugned judgment and order nowhere discloses any justification for restricting interest at the rate of 12% per annum, the same needs to be set aside.

10. In the result, therefore, the impugned judgment and order needs to be set aside and the petition filed by the appellant needs to be allowed ordering modification of award passed by the learned Arbitrator. The quantum of damages awarded by the learned Arbitrator needs to be modified and the same should be read as having awarded to the tune of Rs.84,31,566/-, i.e. 6% being the maximum limit of total value of Rs.14,05,26,100/- in terms of Clause

(1) of the agreement between the parties along with interest at the rate of 17% per annum with effect from 5th August, 1982. The appeal accordingly stands disposed of with the said modification of the award, with no order as to costs.

(R.M.S.KHANDEPARKAR, J)

(DR.D.Y.CHANDRACHUD, J)